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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	88439889
Applicant	Nittany Corporation
Applied for Mark	WEGE
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Appealed class	Class 032. First Use: 2019/06/28 First Use In Commerce: 2019/06/28 All goods and services in the class are appealed, namely: Beer
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Date	05/19/2021

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

APPLICANT: Nittany Corporation
SERIAL NO.: 88439889
MARK: WEGE
FILING DATE: May 21, 2019
INTL. CLASS: 32
To: Hon. Commissioner for Trademarks
P.O. Box 1451
Alexandria, Virginia 22313-1451

APPLICANT'S BRIEF IN SUPPORT OF REGISTRATION

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STATEMENT OF ISSUE FOR REVIEW

Did the Examining Attorney err in refusing registration of Applicant's mark WEGE for "beer" on the ground that the specimens of record allegedly fail to show use of the applied-for mark in U.S. commerce in connection with the applied-for goods?

STATEMENT OF THE CASE

This action arises from the final refusal to register Nittany Corporation's ("Applicant") mark WEGE for "beer" pursuant to Sections 1 and 45 of the Lanham Act, 15 U.S.C. §§ 1051 & 1127, on the ground that the specimens of record allegedly fail to show use of the applied-for mark in U.S. commerce in connection with the applied-for services. Applicant objects to the Examining Attorney's refusal and respectfully submits that the specimens of record are acceptable specimens showing proper use of the applied-for mark in U.S. commerce in connection with the applied-for goods, "beer." Applicant's mark WEGE is therefore entitled to registration.

PROCEEDINGS AND DISPOSITION BELOW

On May 21, 2019, Applicant filed an application with the United States Patent and Trademark Office ("P.T.O.") to register its mark WEGE for "beer" in International Class 32. On November 26, 2019, the P.T.O. issued a Notice of Allowance, and

Applicant filed its Statement of Use on November 26, 2019, together with an image of Applicant's product packaging showing the mark used in direct connection with the applied-for goods.

On December 9, 2019, the Examining Attorney issued a Priority Action in which she refused registration pursuant to Sections 1 and 45 of the Lanham Act, 15 U.S.C. §§ 1051 & 1127, on the ground that the specimen allegedly "does not show the applied-for mark in use in commerce in connection with any of the goods and/or services specified in International Class(es) 32 in the application." Specifically, the Examining Attorney contended that the specimen - a photograph of the beer bottle label bearing the WEGE mark - is unacceptable because it allegedly "only shows use of the mark in association with pretzels as ingredients of ale."

Applicant timely filed a Response to Office Action on June 9, 2020, arguing against the Examining Attorney's objection and explaining that the specimen showed proper use of the mark in connection with the applied-for goods, "beer," in Class 32. Specifically, Applicant explained that "WEGE" in the specimen appears in large, bold letters in orange font directly on the beer bottle label" and that "[c]onsumers encountering the beer would plainly perceive the prominently-featured WEGE mark as a trademark and associate the mark with the beer." In further support of Applicant's position, Applicant also submitted an

additional specimen comprised of a photograph of beer showing the WEGE mark appearing on beer bottle labels and product packaging, thus demonstrating proper use of the applied-for mark in connection with the applied-for goods in Class 32.

On June 26, 2020, the Examining Attorney issued a final Office Action, maintaining her refusal to register Applicant's mark on the ground that the specimens of record allegedly fail to show use of the applied-for mark in use in U.S. commerce in connection with the applied-for goods.

Applicant timely filed a Request for Reconsideration on December 28, 2020, concurrently with a notice of the subject *ex parte* appeal. Also on December 28, 2020, the Trademark Trial and Appeal Board (the "Board") notified Applicant of its receipt of Applicant's notice of appeal and of its suspension of the appeal pending the Examining Attorney's review of Applicant's Request for Reconsideration.

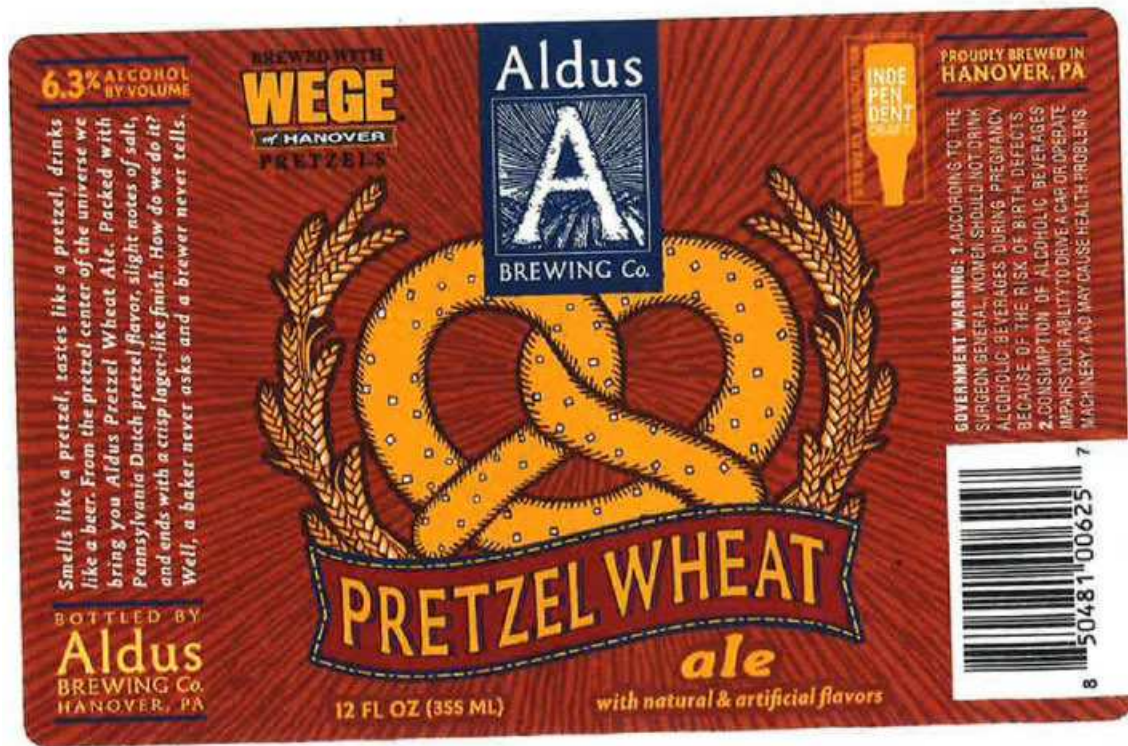
Notwithstanding Applicant's arguments, the Examining Attorney summarily denied Applicant's Request for Reconsideration on February 17, 2021, and the Board notified Applicant on February 18, 2021, that the appeal had been resumed and that Applicant was required to submit the instant brief in support of registration. This appeal marks the culmination of the foregoing prosecution history.

ARGUMENT

This appeal centers on the Examining Attorney's improper refusal to register Applicant's mark WEGE for "beer" based on her flawed position that the specimens allegedly fail to show use of the mark in connection with the applied-for goods.

The Examining Attorney refused registration of the subject mark pursuant to Sections 1 and 45 of the Lanham Act, 15 U.S.C. §§ 1051 & 1127, on the ground that the specimens of record allegedly fail to show use of the mark in connection with the applied-for goods, "beer." The specimens are reproduced here for ease of reference:

Specimen 1, submitted with Statement of Use (November 26, 2019):



Specimen 2, submitted with Response to Office Action (June 9, 2020):



With respect to Specimen 1, the Examining Attorney argued in her 12/09/2019 Priority Action that the specimen allegedly "only shows use of the mark in association with pretzels as ingredients of ale." Regarding Specimen 2, the Examining Attorney argued in her 06/26/2020 final Office Action that the specimen allegedly "shows pretzel wheat ale with 'WEGE' being used to refer to the pretzel ingredients in the beer and not the beer itself." Specifically, the Examining Attorney contends that

Specimen 2 "consist[s] of 'Made with WEGE of Hanover Pretzels' on a beer bottle."

Applicant respectfully submits that, contrary to the Examining Attorney's position, both specimens of record are acceptable specimens that clearly and unequivocally show proper use of the subject mark WEGE in connection with the applied-for goods, "beer." Indeed, as shown in both specimens, WEGE appears in large, bold letters in orange font directly on the beer bottle label and the six-pack beer carrier. Consumers encountering the beer would plainly perceive the prominently-featured WEGE mark as a trademark and associate the mark with the beer.

Furthermore, contrary to the Examining Attorney's argument, both specimens engender a clear association with beer, not a reference to "an ingredient or component of beer." The specimens of record are thus unequivocally acceptable specimens that clearly shows use of the mark in direct connection with the applied-for goods, "beer." See, e.g., T.M.E.P. § 904.03(a) (Oct. 2018) ("[I]f a trademark is ordinarily applied to the goods or the containers for the goods by means of labels, a label is an acceptable specimen.").

Finally, it bears emphasizing that WEGE is a registered trademark and is in no event generic for pretzels. Furthermore, because of the well-known status of the WEGE trademark, the

mark, like many other special call trademarks, is being used as an enticement to consumers to purchase the product offered in connection therewith.

* * *

CONCLUSION

For the foregoing reasons, Applicant Nittany Corporation respectfully requests that the Trademark Trial and Appeal Board reverse the Examining Attorney's final refusal to register its trademark, allowing for registration of the mark.

Respectfully submitted,

NITTANY CORPORATION

Dated: May 19, 2021 By: / Timothy D. Pecsénye /
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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that this correspondence is addressed to the Trademark Trial and Appeal Board, Hon. Commissioner for Trademarks, P.O. Box 1451, Alexandria, Virginia 22313-1451, and is being deposited via the Electronic System for Trademark Trials and Appeals (ESTTA) on May 19, 2021.

/ Bradford C. Craig /
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